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In The

Supreme Court of the United States

October Term, 1993

State of Alaska, Alaska Alcoholic Beverage Control Board, and Alaska Hotel & Restaurant Employee Trust Funds,

Petitioners,

vs.

United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRUCE M. BOTELHO
ATTORNEY GENERAL
Teresa Williams
Assistant Attorney General
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
(907)269-5100
Attorneys for Petitioner State of Alaska, Alcoholic Beverage Control Board

Randall G. Simpson
JERMAIN, DUNNAGAN & OWENS, P.C.
3000 A Street, Suite 300
Anchorage, Alaska 99503
(907) 563-8844
Attorneys for Petitioner Alaska Hotel & Restaurant Trust Funds

67pp

QUESTIONS PRESENTED FOR REVIEW

In Alaska all liquor licenses are created solely by state statute. Alaska law provides that transfer of a liquor license can only occur after all debts and taxes arising from the operation of the liquor license are paid or satisfied. The following questions, which concern enforcement of a federal tax lien against a liquor license are presented here for review.

1. Whether the IRS can create an asset for seizure by forcing the State of Alaska to transfer a liquor license in contravention of the state-created conditions on transferability of the license.

2. Whether the Twenty-first Amendment to the United States Constitution precludes the IRS from enforcement of its federal tax lien by foreclosure and transfer of the state-created liquor license in contravention of the state's laws regulating liquor.

PARTIES TO THE PROCEEDING

The parties to this proceeding are those listed in the caption to this Petition for Writ of Certiorari, in addition to the parties in the case below: City and Borough of Juneau; Alaska Distributors; and Odom Corporation.

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OPINIONS BELOW

On June 1, 1991, the United States District Court for the District of Alaska issued a Judgment and Memorandum of Decision holding that Alaska's liquor license laws were not preempted by federal law and that the statutory restrictions on transfer of the license were a proper exercise of the state's power delegated by the Twenty-first Amendment. A copy is printed in Appendix A, pp. 1 - 20. An Order on reconsideration that rescinded the sale of the liquor license was entered September 18, 1991. A copy is printed in Appendix A, pp. 21 - 22. The Opinion of the United States Court of Appeals for the Ninth Circuit was entered September 30, 1993, affirming in part and reversing in part the lower court's decision. The decision was not published and is reproduced in Appendix B, p. 23 - 29.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 30, 1993. A Petition for Rehearing to the Ninth Circuit was denied on December 16, 1993. This Petition for Writ of Certiorari is filed within ninety days of the denial of the Petition for Rehearing. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) and U.S. Supreme Court Rule 10.1(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Since the constitutional and statutory provisions involved are lengthy, the citations alone are set forth below. The pertinent text is set forth in Appendix C, pp. 23 - 35.

United States Constitution

Twenty-first Amendment

United States Code

Internal Revenue Code 26 U.S.C. § 6321

Alaska Statutes and Administrative Code

Alaska Stat. § 04.11.010
Alaska Stat. § 04.11.030
Alaska Stat. § 04.11.040
Alaska Stat. § 04.11.070
Alaska Stat. § 04.11.260
Alaska Stat. § 04.11.270
Alaska Stat. § 04.11.280
Alaska Stat. § 04.11.330
Alaska Stat. § 04.11.360
Alaska Stat. § 04.11.450
Alaska Stat. § 04.11.470
Alaska Stat. § 04.11.670
Alaska Admin. Code tit. 15, § 104.175

STATEMENT OF THE CASE

A. Factual Background

A complete statement of the facts is set forth in the order entered by the United States District Court, District of Alaska, in this case. *See* Appendi A, pp. App. 2 - App. 5. Petitioner does not dispute this recitation of the facts by the lower court.

For purposes of this petition, however, the following facts are pertinent. A State of Alaska liquor license exists and is distinguished from other types of property because it is wholly created by state statute. Only those applicants who meet the statutory requirements may own and operate a liquor license. ALASKA STAT. § 04.11.010. In creating a liquor license interest, Alaska allowed limited transferability of the license. All transfers of a liquor license must be approved by the State of Alaska Alcoholic Beverage Control Board (hereinafter "ABC Board"). ALASKA STAT. § 04.11.040. The licensee only has the right to petition the ABC Board for transfer of the license. ALASKA STAT. § 04.11.280. The statute enumerates twelve conditions mandating denial of transfer of a liquor license including that "the transferor has not paid all debts or taxes arising from the conduct of the business licensed under this title" or made provision for satisfaction of those debts. ALASKA STAT. § 04.11.360. Other than its use by a licensee to sell alcoholic beverages, a liquor license has value only upon transfer.

Marcello and Nancy Quinto operated a bar in Juneau, Alaska, known as the Office Lounge. The Quintos held an

Alaska liquor license. In 1985 and 1986, the Quintos became delinquent in their taxes in the operation of the Office Lounge, including federal and state employment taxes and local sales and property taxes. The Quintos also became delinquent in pension contributions owed to the Alaska Hotel and Restaurant Pension Trust Fund (hereinafter "Pension Trust Fund") on behalf of their employees.

On July 28, 1986, Juneau recorded a notice of tax lien against the Quintos for $24,854.22. On September 29, 1986, the IRS assessed delinquent taxes against the Quintos totalling $14,389.94. 26 U.S.C. § 6321, 6322. On September 30, 1986, despite a specific statutory provision prohibiting foreclosure (ALASKA STAT. § 04.11.670), the IRS levied upon all the Quintos' property and purportedly seized their liquor license by taking possession of the piece of paper identifying the license hanging on the wall of the Office Lounge.

On October 22, 1986, the IRS published notice of sale of the license and sold the Quintos' liquor license by sealed bid. The IRS was the only bidder and purchased the license for $14,827.43, the amount of the Quintos' federal tax liability.

The IRS did not attempt to qualify under Alaska statutes as a liquor license holder. Over a year later in September 1987, the IRS auctioned the license to the highest bidders Ira Rosen and John Henry on behalf of Wayne Entertainment. The IRS executed a "Certificate of Sale" to Wayne Entertainment. This certificate purportedly transferred "all right, title and interest of the United States"

in the liquor license. This sale for $20,500 was accomplished despite the fact that an Alaskan bar liquor license had a fair market value at that time of over $100,000.

After the IRS had auctioned the liquor license, the IRS applied to the ABC Board to transfer the license to Wayne Entertainment. Pursuant to ALASKA STAT. § 04.11.470, the State of Alaska, the City and Borough of Juneau, and the Pension Trust Fund filed objections to the transfer of the liquor license. Pursuant to ALASKA STAT. § 04.11.360(4), the ABC Board denied the IRS's application to transfer ownership of the liquor license.

B. How the Questions for Review Were Raised

1. Action in Federal District Court

The IRS instituted the instant action because it could not transfer a State of Alaska liquor license that it had obtained by levy and seizure of all the Quintos' property. The IRS asked the court to determine the interests of the parties in the liquor license and to order the ABC Board to transfer the liquor license to the IRS's buyer.

On June 14, 1991, the District Court entered an order in favor of the State of Alaska, City and Borough of Juneau, the Pension Trust Fund and other parties. The court held that Alaska's liquor law is not preempted by federal law and that the Alaska liquor law was promulgated pursuant to the power delegated to the state by the Twenty-first Amendment. The court held that the restriction on the transfer of a liquor license under ALASKA STAT.

§ 04.11.360(4) is a proper exercise of State power and that the IRS could "acquire or transfer its interest in the license only upon satisfaction of the creditors' claims." App. A at p. 10. The court also held that "[d]ue to the restrictions on transfer, the holder of a lien on a liquor license, including the United States, possesses only the right to apply to the ABC Board for a transfer of the license." App. A at p. 12 (emphasis added). Upon motion for reconsideration, the court also rescinded the sale of the liquor license to the IRS's buyer, Wayne Entertainment, and vacated that portion of its order deciding priority of the IRS claims over other creditors.

2. United States Court of Appeals for the Ninth Circuit

On appeal to the Ninth Circuit, the court affirmed the decision rescinding the sale of the liquor license holding that the ABC Board could properly deny the transfer. App. B at p. 22. The court noted that the "interest in property to which a federal lien attaches is the 'residual value' of the property after such state and local taxes are paid." *App. B at p. 21.* However, citing to *United States v. Battley (In re Kimura)*, 969 P.2d 806 (9th Cir. 1992), the court held that Alaska was not permitted by statute to reserve to third party creditors, *i.e.*, Pension Trust Fund, the right to be satisfied prior to transfer of a state-created liquor license. *Id.*

REASONS FOR GRANTING THE WRIT

A. The IRS Cannot Void the Conditions of Transferability Adopted by the State of Alaska in Creation of the State Liquor License as a Property Interest.

1. The IRS Can Only Step Into the Taxpayer's Shoes

It is settled law in this Court that a federal tax lien cannot extend beyond the property or interest in property that was originally held by the delinquent taxpayer. *United States v. Rodgers*, 461 U.S. 677, 690-691 (1983). As this Court admonished in *Rodgers*, "the tax collector not only steps into the taxpayer's shoes, but must go barefoot if the shoes wear out." *Id.* at 691 n. 16 (citation omitted). The Ninth Circuit, in the decision below, gave partial effect to Alaska law which limited the property interest of the Quintos in the liquor license attached by the federal tax lien. However the court ruled that the residual value of the state-created liquor license was limited only by the taxes, both state and local, arising from the conduct of the licensed business. The court did not give effect to the portion of ALASKA STAT. § 04.11.280(4) which provides that the ABC Board must deny transfer of the liquor license when the "transferor has not paid all debts or taxes arising from conduct of the business licensed . . . " (emphasis added).

It is undisputed that the Quintos, the delinquent taxpayers, could not have sold and transferred their liquor license without paying the pension debts of their employees as well as the taxes of the IRS, State of Alaska, and City and Borough of Juneau. By its decision, the court allowed

the IRS to step into "better shoes" than the Quintos and avoid the debts of the Pension Trust Fund.

2. The Alaska Liquor License Statutes Create the Parameters and Nature of the Property or Interest in Property Held by a Liquor License Holder.

It is also settled law of this Court that the federal tax law does not create property rights but only attaches federal consequences to property rights created under state law. *United States v. Bess*, 357 U.S. 51, 55 (1957). Under 26 U.S.C. § 6321, a federal tax lien assessed against the Quintos for unpaid federal tax, interest and penalties attaches to "all property or rights to property" that belong to the Quintos as delinquent taxpayers. The threshold inquiry, then, is what property or rights to property the Quintos held in a State of Alaska liquor license.

The extent and nature of the property interest held by the Quintos is defined by Alaska liquor license law. *See Aquilino v. United States*, 363 U.S. 509 (1960). Cautioning against the development of a "nebulous body of federal law" to define state-created property interests, this Court explained the necessity of looking to state law and statutes:

> It is suggested that the definition of the taxpayer's property interests should be governed by federal law . . . . We think that this approach is unsound because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law. It would indeed be anomalous to say that the taxpayer's 'property and

> rights to property' included property in which, under the relevant state law, he had no property interest at all.

Id. at 513, n. 3. It is important to note that a State of Alaska liquor license is distinct and unique from other types of property or property interests because it is a thing that exists only because it is created by state statute.

Alaska liquor licenses are heavily regulated. Applicants for liquor licenses are subject to scrutiny by the ABC Board and by any local governing body. ALASKA STAT. § 04.11.260. Licenses are also scrutinized during annual renewal of the license. ALASKA STAT. § 04.11.270. Moreover, a liquor license may be forfeited or otherwise lost without compensation. For example, the ABC Board may for a variety of reasons, some beyond the control of the licensee, deny an application for annual renewal of a license. ALASKA STAT. § 04.11.330. In addition, the Alaska legislature has provided for non-renewal of a liquor license if the licensed premises was not operated for at least 30 eight-hour days during the past calendar year. ALASKA STAT. § 04.11.330(a)(3). This provision insures that a license maintains its character as a license to conduct business, rather than a financial asset. Additionally, an Alaska liquor license cannot be devised by will, although the administrator of an estate may apply within certain time limits to transfer the license. ALASKA STAT. § 04.11.030. *Application of Harris*, 15 Alaska 250 (1954).

Most significantly, by statute, an Alaska liquor license is not subject to foreclosure and may not be used as collateral to secure debt. ALASKA STAT. § 04.11.670. An Alaska liquor license may not be encumbered and an unlicensed person is prohibited from holding a direct or

indirect financial interest in a licensed business. ALASKA STAT. § 04.11.450.

Plainly, an Alaska liquor license is not freely transferable by the holder of the license. The ABC Board must approve all transfers or attempted transfers of Alaska liquor licenses, including an outright transfer to another person and the transfer of a controlling interest in the partnership or corporation holding the liquor license. ALASKA STAT. §§ 04.11.040; 04.11.070. The Alaska Supreme Court has held that "any transferee, even one who takes for valuable consideration, takes only the right to petition the ABC Board for transfer of the liquor license." *Queen of the North v. Legrue*, 582 P.2d 144, 149 (Alaska 1978) (emphasis added).

The grant of approval of any request for transfer is subject to a number of mandatory factors set by statute. ALASKA STAT. § 04.11.360. Although an Alaska liquor license frequently has economic value on transfer, the license has no value if debts and taxes arising out of the operation of the license are not satisfied. ALASKA STAT. § 04.11.360(4). It is important to note that this statutory condition on transferability of the license is limited to business-related creditors only. Other creditors of the liquor license holder have no recourse to satisfy debts before the transfer of a liquor license or in any other way from the liquor license. Since an Alaska liquor license transfer is subject to the approval of the ABC Board, the license as a property interest has no independent financial value without that approval.

The Ninth Circuit has previously ruled that the "property rights" in a state-created liquor license are limited by conditions of transferability incorporated by the state law creating that liquor license. *United States v.*

California, 281 F.2d 726 (9th Cir. 1960). In that case, the United States had asserted the supremacy of its tax lien over the state tax claim to the proceeds of the sale of the state-created liquor license. Under California law, the state could refuse transfer of the liquor license if the applicant was delinquent in the payment of state taxes. The court in *United States v. California* held that the state could create such a conditional property interest and that the IRS could not seize more than the property interests that the state had created:

> Here, the license existed because the state had issued it. If the licensee acquired something of value, it was because the State had bestowed it upon him. Whatever value the license, as property, may have had to a purchaser depended upon its transferability. If it was transferable, it was because the State had made it so. If the State had seen fit to impose conditions upon issuance or upon transfer of property it has solely created, that is the state's prerogative, so long as its demands are not arbitrary or discriminatory. The federal government has no power to command the State in this area. It has no power to direct that property be created by the State for purposes of federal seizure.

281 F.2d at 728 (emphasis added).

This Court in *Hyde v. Woods*, 94 U.S. 523 (1876) held that a property is created and encumbered with its conditions of purchase or transfer. In *Hyde*, this Court dealt with the question of whether the rule of the Stock Exchange, requiring members' debts to be satisfied from proceeds of sale of a seat on the Exchange, was an unlawful preference under federal bankruptcy law. This Court stated:

> A seat on this board is not a matter of absolute purchase. Though we have said it is property, it is incumbent with conditions on purchase, without which it could not be obtained. . . . That rule entered into and became an incident of the property when it was created, and remains a part of it into whose hands so ever it may come.

94 U.S. at 525.

The State of Alaska created the liquor license held by the Quintos with conditions on transfer at inception and strictly limited the residual value of the property on transfer by requiring payment of all debts and all taxes. No priority was given; taxes (federal, state and local) and pensions owed by Quintos to their employees are treated equally. As the court advised in *United States v. California*, the federal government has no power to command a state to create a liquor license for purposes of federal seizure. 281 F.2d at 728.

3. The Conditions on Transferability of the Alaska Liquor License Create Residual Value in the Property and Not a Priority Scheme in Contravention of Federal Supremacy Law.

In *Aquilino v. United States*, 363 U.S. 509, 512 (1960) this Court noted that the "threshold question" in any case where the federal government asserts a tax lien is the determination of the extent to which the "taxpayer had 'property' or 'rights to property' to which the tax lien could attach." Once the determination of the legal nature of legal interests of the taxpayer and the property is made, then and only then does an issue of the priority of federal tax liens arise. *Id.* at 513-514. As this Court reasoned in *United States v. Bess*, 357 U.S. 51 (1958), a federal tax

lien could not attach to proceeds of an insurance policy of the deceased delinquent taxpayer because "it would be anomalous to view as 'property' subject to lien proceeds never within the insured's reach to enjoy . . ." 357 U.S. at 55-56. So too, the federal tax lien here could not attach to value in the liquor license that the Quintos did not enjoy.

The Court in *Aquilino* also saw no conflict between state and federal law merely because there may be no property interest to which the federal tax lien under state law would attach. *Aquilino v. United States*, 363 U.S. at 514 n. 5. If the Pension Trust Fund, the State of Alaska, or the City of Juneau had decided that it was not in its interest to agree to the transfer of the Quintos' liquor license, then the Quintos' liquor license would simply have had no value to which the federal tax lien can attach.

The Ninth Circuit in *United States v. California* noted that:

> The question . . . is not as to the supremacy of the tax lien of the United States. The question is as to the nature of the 'property and rights to property' to which that lien attached. . . .

281 F.2d at 727-28 (citation omitted). Conversely, the Sixth Circuit in *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168 (8th Cir. 1990) refused to view the question as one where the state had reserved an interest in the liquor license or a limitation placed on the debtor's interest in the license. *Id.* at 1173. Instead, the court viewed the statute as a "debt collection" technique and as such established a "priority" over an after-filed federal tax lien. *Id.*

The Ninth Circuit's property analysis of the issue, as opposed to the Sixth Circuit's priority-of-lien analysis, is logical and consistent with U.S. Supreme Court case law

cited above. Ownership of "property" includes certain rights:

> the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects.

BLACK'S LAW DICTIONARY (5th ed. 1979). By state law, the Quintos held no such "unrestricted" or "indefinite right of use." State law creating the asset did not give the Quintos an absolute right to sell the license.

When a state creates a wholly new interest in property, such as an Alaska state liquor license, which had no existence, no transferability and no value apart from the state law creating it, the state has the inherent power to set and impose conditions on transfer which limit the value of that property. This situation is distinguishable from a state's decision to attach conditions to the transfer of an existing property interest which was not created by state statute. The conditions on transferability of a new and statutorily created property interest are part of and inherent in the value of that property at inception, such that the "federal government has no power to command the state in this area." *U.S. v. California*, 281 F.2d at 728. Federal taxing authority does not extend to telling the state of Alaska to create an asset and also create conditions of transfer such that the federal taxing authority can seize it for a value greater than the delinquent taxpayer's interest.

Petitioners contend that the property analysis employed by the Ninth Circuit was correct as far as it went. However, the Ninth Circuit erred when it created a new "residual value" of the taxpayer's interest in the liquor

license by requiring transfer without payment of all debts arising from the operation of the Quintos' liquor license. This error so far departs from the United States Supreme Court precedent in the area that this Court's power of supervision should be exercised to correct it.

B. The Twenty-first Amendment Protects Alaska's Right to Implement its Laws Governing Foreclosure on and Transfer of a Liquor License Despite the Existence of an IRS Tax Lien.

Within its area of jurisdiction, the Twenty-first Amendment to the United States Constitution gives each state "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota v. United States*, 495 U.S. 423, 431 (Justice Scalia concurring at 444) (1990). The plurality of the Court went on to state in *North Dakota*:

> Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly.

495 U.S. at 433; *N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981) (*per curiam*).

The U.S. Supreme Court has adopted a two-level test in those instances when the Twenty-first Amendment conflicts with another constitutional provision. First, the Court must determine whether a state is exercising a "core" power under § 2 of the Twenty-first Amendment. If so, no federal preemption issue exists. If not, the Court must then weigh the state and federal interests to determine which has greater stature.

In the case of *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 98 (1980), the Court reviewed California's use of a resale price maintenance plan that violated the federal Sherman Act. After a discussion of cases involving a conflict between state and federal powers, the Court noted that

> there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."

445 U.S. at 110 (emphasis added). In *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), the Court spoke in terms of "core" powers:

> [W]e have held that when a State has not attempted directly to regulate the sale or use of liquor within its borders - the core § 2 power [under the Twenty-first Amendment] - a conflicting exercise of federal authority may prevail.

467 U.S. 713.

The Court, in *Capital Cities Cable*, outlined the following logical process to resolve conflicts between state and federal efforts to regulate transactions involving liquor:

> [T]he central question . . . is . . . whether the interests implicated by a state regulation are so closely related to the powers reserved by the

> Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies. As in *Hostetter* and *Midcal Aluminum*, resolution of this question requires a "pragmatic effort to harmonize state and federal powers" within the context of the issues and interests at stake in each case.

467 U.S. at 713 (citation omitted).

In this case, the IRS is challenging Alaska's ability to control foreclosure on and transfer of a state liquor license. Under the two-level test set by the U.S. Supreme Court, this Court must determine whether core powers of the state are implemented through its laws at issue. If so, the state liquor laws must prevail. If not, the state laws would still prevail if the Court finds that they do not significantly interfere with a federal interest of greater stature.

Core powers include importation and sale of liquor, structure of the liquor distribution system, promotion of temperance, orderly market conditions, and raising revenues. *North Dakota*, 110 S. Ct. at 1992-93. Alaska directly implements these interests by issuing a limited number of licenses to only those persons who are approved by the ABC Board after an application process and by controlling the time, place, and manner in which licensees distribute alcohol. Alaska also directly implements these interests by ensuring legitimate sources of credit to the liquor industry and controlling the power of creditors to coerce a license holder.

Alaska's scheme for controlling transfer of licenses is two-fold: It takes away traditional creditor protections in order to regulate more closely those who hold an interest

in or power over a liquor license and to preclude unregulated transfers by foreclosure; it then provides a less traditional form of creditor protection by giving the creditor power to block transfer of a license. Alaska's law serves state interests directly related to the core § 2 powers conferred under the Twenty-first Amendment.

The foreclosure action attempted by the IRS on the Office Lounge liquor license is prohibited under state law. ALASKA STAT. § 04.11.670. Alaska law also forbids any person from holding a liquor license, even when not operated by that person, when transfer to that person has not been approved by the ABC Board. ALASKA STAT. § 04.11.040 (1986); ALASKA STAT. § 04.11.450 (Supp. 1991). By seizing and holding a liquor license without state approval, the IRS is interfering with the state's exclusive control over licenses to sell alcohol. The IRS is further attempting to compel the ABC Board to transfer the liquor license from the IRS to a third party, without compliance with state law restrictions on transfer.

A liquor license is state permission to sell a dangerous substance. Alaska has a core § 2 power to ensure the orderly transfer of liquor licenses and limit creditor control over liquor licenses. A foreclosure action on a liquor license is by its very nature a transfer of a liquor license without board approval. The protection against foreclosures granted in ALASKA STAT. § 04.11.670 is not designed to protect the licensee or any creditor. Instead, the state has exercised its core § 2 powers to protect the citizens of Alaska from forced and unregulated transfers of liquor licenses.

Alaska has precluded creditors from foreclosing liens as part of its larger statutory scheme prohibiting undisclosed interests in a liquor license. ALASKA STAT. § 04.11.450;

ALASKA STAT. § 04.11.040; ALASKA ADMIN. CODE tit. 15, § 104.175. This protection against undisclosed interests -- that can undermine public welfare in substantial ways (for example, when criminal elements gain control of liquor licenses) -- can be defeated if creditors of licensees are able to foreclose liens arising out of debts. The power to foreclose a lien implies the power to coerce. Coercion, when exercised by the wrong element, could be detrimental to the public health, safety, morals, and welfare. For these same reasons, Alaska does not allow a licensee to use a license as collateral to secure a debt. ALASKA STAT. § 04.11.670.

The only protection given to creditors is a "hold" on transfer, which may only be exercised for those debts arising out of the operation of the licensed premises. Alaska has a core § 2 interest in ensuring that license holders do not abuse the protection that they have against creditors. Alaska has a substantial interest in protecting the integrity of its business climate, including those businesses that interact with licensed premises.

Perhaps most importantly, Alaska also has a core § 2 interest in encouraging legitimate and traditional sources of credit to be extended to license holders. For core § 2 reasons, Alaska precludes creditor claims from becoming "choate" during the life of the license. However, legitimate creditors will not be inclined to extend credit if a later federal tax claim can extinguish their rights. Alaska has a compelling interest in keeping unsavory lenders out of the liquor business by giving protection to all creditors -- who are scrutinized when they seek protection at time of transfer. Alaska's ability to maintain a clean liquor industry would be gravely impaired if the IRS is allowed "priority" on a tax lien over an earlier trade debt.

In essence, the IRS seeks to benefit from Alaska law which precludes prior trade debts from becoming choate, but seeks exemption from state law governing transfers of licenses. Although creditors do not have the power under Alaska law to obtain a choate lien on a license or to foreclose on a license to secure payment of a debt, they have automatic and equal right to protection at the time of transfer of the license. They do not need to take any action prior to transfer of the license to ensure protection. As part of a transfer application, it is the licensee's obligation to advise the ABC Board of all the debts of the business and taxes due by the business. ALASKA STAT. § 04.11.280. At that time, the ABC Board contacts each listed creditor. *Id.* The ABC Board may not approve transfer of the license if there are unpaid debts or taxes, unless the transferor gives security for the payment satisfactory to the creditor. ALASKA STAT. § 04.11.360. A liquor license has no transferrable value if the debts and taxes are not satisfied.

Alaska is not speculating about the problems which would result from federal preemption of state liquor law. If unchecked, it must be presumed that the IRS will continue to become the holder of Alaska liquor licenses without state approval and that trade debts and taxes incurred prior to a federal tax lien would not be satisfied on transfer of the license. In two other circuit courts' decisions, the courts recognized the pressures that would be asserted against the states to amend their liquor laws if the laws were preempted by federal law, even when those liquor laws were adopted to further the states' alcohol control policies. In both cases, the courts held that federal law preempted state law, but in neither decision was the Twenty-first Amendment mentioned. *In re Terwilliger's Catering Plus*, 911 F.2d 1168 (6th Cir. 1990); *21 West Lancaster Corp. v. Main Line Restaurant*, 790 F.2d 354

(3rd Cir. 1986). The only solace that the Third and Sixth Circuit courts could offer to the affected states was an invitation to revise state law, such as allowing forecloseable liens against liquor licenses. *Terwilliger's* at 1177-78; *21 West Lancaster* at 359.

Alaska's interests arise from its core powers that override any conflicting federal power. Even if this were not so, the state interests -- of ensuring the orderly transfer of liquor licenses, regulating the holders of liquor licenses, ensuring that debts of an alcohol beverage dispensary are paid by the licensee, and encouraging legitimate sources of credit for the liquor business -- are of greater stature than the general federal interest to collect taxes before other debts or taxes are paid.

The state amply protects the federal interest in tax collection at time of transfer. No creditor or tax is paid ahead of federal taxes. Although the federal interest in collecting taxes is important, it is not as important as the state's right to control the liquor industry and, in fact, defeats legitimate state interests.

The federal interests that have been found to defeat the state's powers under the Twenty-first Amendment have uniformly been ones which were central and specific to a national policy, such as individual constitutional rights or the sanctity of a uniform, national system of commerce. The Oklahoma law at issue in *Capital Cities Cable* would have impacted the federal right to regulate all cable communications which entered that state, even though the cable communications reached a number of other states. The pricing scheme at issue in *Midcal Aluminum* was in direct violation of the antitrust restrictions of the Sherman Act. *Dep't of Revenue v. James Beam*, 377 U.S. 341 (1964), involved state taxation of imported liquor in

violation of the Export-Import Clause of the constitution. This Court has also held that the Twenty-first Amendment does not insulate the liquor industry from the constitutional requirements of equal protection and due process. *Craig v. Boren*, 429 U.S. 190, 204-09 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). These interests are all strong direct federal concerns that would have been infringed by enforcement of the state power. This case does not involve a like federal interest.

Even in an area as important as First Amendment liberties, a state is allowed to enforce laws which would infringe on those rights. In *California v. LaRue*, 409 U.S. 109 (1972), the U.S. Supreme Court upheld, under the Twenty-first Amendment, state laws that would otherwise have been found to "proscribe some forms of visual presentation that would not be found obscene under *Roth* and subsequent decisions of this Court." The Court held that

> wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment.

409 U.S. at 116 (citation omitted).

Alaska has identified legitimate state interests in liquor control which must be protected, and has implemented laws which protect those interests within the "wide latitude as to choice of means" that must be afforded under the Twenty-first Amendment. Because Alaska enacted the laws at issue in this case pursuant to its core § 2 power under the Twenty-first Amendment, the state laws cannot be preempted by contradictory federal law. Even if core powers were not invoked, the state interests outweigh the federal interests involved. The Twenty-first Amendment

clearly protects Alaska from being compelled by the federal government to transfer a license in violation of the conditions on transferability of its liquor law. The Twenty-first Amendment requires that the federal government comply with state law when it seeks to seize and transfer the Quintos' liquor license. This Court should grant certiorari to correct the Court of Appeals' ruling that the IRS was not required to comply with Alaska liquor law regarding transfer of the Quintos' license.

CONCLUSION

The IRS cannot claim any greater interest in an Alaska liquor license than that created by the State of Alaska. The IRS stands in the shoes of the Quintos and cannot force the transfer of their license to a new buyer, in violation of Alaska law, when the Quintos had no such power. The state law creating the interest in a liquor license and conditions of its transferability are protected by the Twenty-first Amendment and should be upheld, in their entirety, by this Court. The oversight powers of this Court to preserve these settled legal principles should be invoked and this petition GRANTED.

DATED this ____ day of March, 1994.

BRUCE M. BOTELHO
ATTORNEY GENERAL
TERESA E. Williams
Assistant Attorney General
State of Alaska
Attorney for Petitioner State of Alaska Alcoholic Beverage Control Board

RANDALL G. SIMPSON
JERMAIN, DUNNAGAN & OWENS, P.C.
Attorneys for Petitioner Alaska Hotel & Restaurant Employee Trust Funds

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A89-475 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF ALASKA, et al.,

Defendants.

ORDER
(Defendants Granted Summary Judgment)

The court now has before it cross-motions for summary judgment filed by plaintiff, the United States of America, on behalf of the Internal Revenue Service ("IRS") and by the following defendants: the State of Alaska, the City and Borough of Juneau, Odom Corporation, Alaska Distributors, and the Alaska Hotel and Restaurant Employees Trust Funds (herein collectively "the defendants"). Oral argument has not been requested and is deemed unnecessary for disposition of these motions. For the reasons set forth below, the court hereby denies the motion of the IRS for summary judgment and grants defendants' motion.[1]

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[1] On April 30, 1990, an order of default was entered against defendants Madeline Gordon, C.J. Enterprises, Capitol City Weekly, KINY, Capital Development, and Marcello Quinto and Nancy Quinto.

This suit arises from the refusal of the State of Alaska Alcoholic Beverage Control Board ("ABC Board") to transfer a liquor license. The liquor license in question was originally issued by the ABC Board to Raymond and Madeline Gordon in 1978. In June of 1987, the ABC Board granted the Gordons' permission to transfer the license to Marcello and Nancy Quinto. As part of the transfer, the parties agreed that the license would be assigned back to the Gordons in the event of a default on the note. The Quintos began operating their establishment under the name of "Marcello's" and, with the approval of the ABC Board, later changed the location and the name of the establishment to the "Office Lounge".

In 1985 and 1986 the Office Lounge became delinquent in the payment of sales and personal property taxes to the City and Borough of Juneau. On July 28, 1986, Juneau recorded a notice of tax lien against the Quintos in the amount of $24,854.22 for delinquent sales tax returns. The notice was recorded in the Juneau Recording District. Thereafter, a notice of lien was filed with the ABC Board on August 18, 1986, by Capital Development Partnership for delinquent rents in the amount of $35,264.23.

On September 29, 1986, and December 8, 1986, the Quintos and the Office Lounge were assessed by the IRS for failure to pay federal employment taxes for the 1985 and 1986 tax years. On September 30, 1986, a notice of federal tax lien in the amount of $14,389.94 was filed against the Quintos in the Juneau Recording District. That

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Marcello Quinto and Nancy Quinto.

$3,108.75 in cash, some personal property, and the liquor license for the Office Lounge. It is not disputed that the IRS sent proper notice and demand for payment to the Quintos.

By letter dated October 1, 1986, the IRS notified the ABC Board of its lien on the Quintos' liquor license. On October 22, 1986, a notice was published in the *Juneau Empire* newspaper and was posted at the State Office Building and a local mall, stating that the IRS would sell the Quintos' license pursuant to a sealed bid sale on November 20, 1986. At the sale the IRS itself purchased the liquor license for $14,827.43; no other bids were submitted at the sale.

Prior to the sale, Madeline Gordon applied to the ABC Board for an "Involuntary Transfer of License Holder" pursuant to her preexisting agreement with the Quintos and AS 04.11.360(4)(b). Thereafter, on December 23, 1986, the Quintos filed for Chapter 11 bankruptcy. At the ABC Board meeting of February 4 and 5, 1987, Madeline Gordon's application for transfer of the license was denied due to a hold on the license arising from the bankruptcy proceedings.

In September of 1987, the IRS placed an ad in the *Juneau Empire* notifying the public that the Quintos' license would be sold by the IRS at auction. The auction was held on September 30, 1987, with the highest bid being $20,500.00 submitted by Ira Rosen and John Henry

on behalf of "Wayne Enterprises/Entertainment".[2] On October 26, 1987, Madeline Gordon protested the transfer of the license by the IRS at public auction.[3] Additionally, by letter dated October 26, 1987, the bankruptcy trustee protested the transfer of the license from the Quintos to the IRS.

On February 27, 1987, the IRS applied to the ABC Board for an annual renewal of the liquor license. Juneau waived its right to protest the renewal of the license based upon assurances by the IRS that proceeds from the sale of the liquor license would be applied towards the outstanding debt of approximately $35,399.06 owed to Juneau by the Office Lounge.

On January 6, 1988, the IRS applied to the ABC Board for a transfer of the liquor license to Wayne. Protests against the transfer were made by the defendants on the basis that there were unsatisfied creditors pursuant to AS 04.11.360(4)(A). On April 13 and 14, the ABC Board denied the IRS's application to transfer the license. On May 12, 1988, the IRS received a letter from the ABC Board which denied the requested transfer because of the various creditor claims, the Quintos' bankruptcy

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[2] There is a conflict in the pleadings as to the proper name of the Rosen/Henry entity. For purposes of consistency, the court will refer to the entity as "Wayne."

[3] Madeline Gordon was divorced from Raymond Gordon in 1984. Raymond released his interest in the Quintos' debt to his former spouse.

proceedings, and because Madeline Gordon might possess standing to transfer the license back to herself.

The court now has before it competing creditors' claims against the proceeds of the sale of the Quintos' license. Both the United States and the defendants claim priority against the proceeds to satisfy debts owed.

The United States claims that the action of the ABC Board in denying the transfer of the liquor license warrants injunctive relief. It maintains that the Board's refusal improperly interferes with the United States' ability to transfer the delinquent taxpayers' right, title, and interest in the liquor license and to obtain the proceeds thereof to satisfy delinquent taxes. If relief is denied, the United States argues, it will suffer irreparable injury in that it will not be in a position to collect the taxes owed. The United States has therefore brought this action, requesting that this court determine the title and interest to the liquor license and for injunctive relief compelling the State of Alaska (the ABC Board) to transfer the license to Wayne or any purchaser who qualifies under Alaska law. Lastly, it is requested that all other defendants (save the State of Alaska) be enjoined from claiming any right or interest in the Quintos' liquor license.

Defendants have filed cross-motions for summary judgment. The principal argument raised is aimed at whether the IRS's claim of priority against the liquor license is sufficient to warrant that the ABC Board transfer the license to Wayne. Defendants assert that an Alaska liquor license is a state interest, created pursuant to the twenty-first amendment of the United States Constitution. It is urged that this grant of authority prohibits the transfer

of the license to Wayne until creditors' claims against the license have been satisfied.

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). On motions for summary judgment, the court views the evidence and the inferences therefrom in the light most favorable to the non-moving party. *T.W. Electrical Services, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626 (9th Cir. 1987). There are no factual disputes in the matter before the court; summary judgment is therefore appropriate.[4]

The principal dispute before the court concerns a conflict between the IRS's authority to lay and collect taxes under article I, section 8, of the United States Constitution with the provisions found at Title 4 of the Alaska Statutes. The IRS urges the court to find that Title 4 improperly interferes with the supremacy of federal law in the area of tax collection. The court does not agree.

The twenty-first amendment grants authority to the states to prohibit the transportation, sale, manufacture, or

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[4] Given that the court has ruled in favor of the defendants, the court has interpreted the evidence and the inferences therefrom in the light most favorable to plaintiff.

possession of intoxicating liquors. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). Title 4 was promulgated by the Alaska Legislature pursuant to the power delegated to it by the twenty-first amendment. It is well established that states may also adopt measures reasonably appropriate to achieve the objectives granted them and exercise full police authority in respect to them. *Id.*

The Alaska Legislature has given the ABC Board full power, authority, and control to regulate the sale and possession of intoxicating liquors. *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 586 (Alaska 1960). As part of the mechanism designed to ensure the regulation of intoxicating liquors, the legislature delegated to the ABC Board the power to create liquor licenses and place conditions on their transfer. *Id.* at 587; *see* AS 04.11.010 and AS 04.11.360. The IRS takes exception to the actions of the ABC Board under AS 04.11.360(4) which prohibits the transfer of a liquor license pending the satisfaction of creditors' claims against the license.

The statute provides in relevant part:

> *Sec. 04.11.360. Denial of transfer of a license to another person.* An application requesting approval of a transfer of a license to another person under this title shall be denied if.
>
> . . . .
>
> (4) the transferor has not paid all debts or taxes arising from the conduct of the business licensed under this title unless

> (A) the transferor gives security for the payment of the debts or taxes satisfactory to the creditor or taxing authority; or
>
> (B) the transfer is pursuant to a promise given as collateral by the transferor to the transferee in the course of an earlier transfer of the license under which promise the transferor is obliged to transfer the license back to the transferee in the event of default in payment for property conveyed as part of the earlier transfer of the license[.]

The IRS asserts that its tax lien against the license is superior to the liens of those creditors claiming a "hold" on the transfer pursuant to AS 04.11.360(4). The IRS bases this contention on the claim that the liquor license is "property" within the meaning of 26 U.S.C. § 6321 of the Internal Revenue Code and urges that the IRS lien should be classified as superior to the other liens asserted by the various municipal and private defendants. The court disagrees.

The IRS relies on Section 6321 which creates a federal tax lien in the amount of any unpaid tax on "[a]ll property and rights to property, whether real or personal, belonging to" the delinquent taxpayer. Where the federal government asserts a tax lien, the threshold question is whether and to what extent a taxpayer had "property and rights to property" to which the federal lien could attach. *Aquilino v. United States*, 363 U.S. 509 (1960). In determining the extent of a taxpayer's legal interest in property sought by the IRS, federal courts look to state law. *United States v. Bess*, 357 U.S. 51 (1957); *Aquilino*, 363 U.S. at 513. In determining the extent of a debtor's property interest, the court is not to look at the competing claims against the

debtor, but to the nature of the debtor's property rights in the license. *In re Professional Bar Co.*, 537 F.2d 339, 340 (9th Cir. 1976).

Under Alaska law a liquor license is a property interest created entirely by state statute. AS 04.11.010, *et seq.* However, an ownership interest in a liquor license is not absolute, and in order for a liquor license to be transferred, for any reason, there must be consent of the ABC Board. AS 04.11.360. Under this scheme the holder of a liquor license possesses an interest in the license subject to the terms of the statutes which created the license and provided conditions for its transfer. *See In re Anchorage International Inn, Inc.*, 718 F.2d 1446, 1449 (9th Cir. 1986); *In re Professional Bar Co.*, 537 F.2d at 340.

The State of Alaska has reserved unto itself substantial control over the transferability of the license. While the IRS is correct in claiming that the license can be categorized as "property" because a seller may retain a security interest in the license (AS 04.11.670), or that a license does not automatically expire upon the death of the licensee (AS 04.11.030), it is undisputed that the Quintos' interest, or any other possessor of that interest, would take the license subject to subsection 360(4) whereby a license holder seeking a transfer of the license must first pay all liquor-related creditors. *In re Anchorage International Inn, Inc.*, 718 F.2d 1446 (9th Cir. 1983; *C.Y., Inc. v. Brown*, 574 P.2d 1274, 1277 (Alaska 1978).

In this instance the IRS is in a similar position. Upon purchase of the license the IRS acquired only the "rights to property" as determined by the terms of the statutes which created it. *In re Professional Bar Co.*, 537 F.2d at 340. Additionally, the IRS's property interest in the license is

not absolute; the IRS can acquire or transfer its interest in the license only upon satisfaction of creditors' claims.

In *United States v. State of California*, 281 F.2d 726 (9th Cir. 1960) (hereinafter *California*), the Ninth Circuit considered a similar issue of priority between a state and federal tax lien on a liquor license. The issue before the court was the priority as between a federal tax lien and state taxes under a state statute requiring a state ABC Board to condition and refuse to transfer a liquor license when the owner of the license was delinquent.[5] In holding that the state was permitted to retain the sum owed in preference to the IRS's claim of federal supremacy, the court stated:

> Here the license existed because the state had issued it. If licensee acquired something of value, it was because the state had bestowed it upon him. Whatever value the license, as property, may have had to a purchaser depended upon its transferability. If it was transferable, it was because the state had made it so. If the state [has] seen fit to impose conditions upon issuance or upon transfer of property it has wholly created, that is the state's prerogative so long as its demands are not arbitrary or discriminatory. The federal government has no power to command the state in

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[5] The applicable California statute involved at the time corresponds to the Alaska statute in that the California ABC department could refuse to transfer any liquor license when an applicant for the license was delinquent in payment of any taxes due. *California*, 281 F.2d 726, 727.

> this area. It has no power to direct that property be created by the state for purposes of federal seizure.

Id. at 728. *California* is still looked upon favorably in this circuit.[6]

Other Ninth Circuit cases have similarly decided this issue. *In re Farmer's Markets, Inc.*, 792 F.2d 1400 (9th Cir. 1986) (debtor's property interest impaired by state statute limiting transfer of liquor license until delinquent state taxes paid, deceased debtor's estate to take the license subject to restriction imposed on the debtor by transferor). *See also In re Anchorage International Inn*, 718 F.2d at 1466; *In re Professional Bar Co.*, 537 F.2d at 340.

Moreover, in *California* the Ninth Circuit determined that the imposition of conditions on the transfer of property were lawful so long as those conditions were not arbitrary or discriminatory. *California*, 281 F.2d at 728. On this issue, there is no evidence to show that the Alaska conditions upon the transfer of the subject license were in any way arbitrary or discriminatory. All holders of a liquor license are similarly bound by the rule that a sale of a liquor license will not be consummated until the debts are paid. *In re Anchorage International Inn*, 718 P.2d at 1449. Moreover, this rule encourages the extension of credit by providing that a creditor has a priority right to payment from a particular asset, namely, the liquor license.

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[6] The court declines to follow the Sixth Circuit case of *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168 (6th Cir. 1990), *petition for cert. filed*, _____ (U.S. Nov. 30, 1990) (No. 90-772).

Id. It is the court's opinion that such a restriction is not arbitrary and capricious under *California*.

Under Alaska law, the ABC Board is the entity authorized to control sales of liquor through the issuance of licenses to the public. Any transferee, even one who takes for consideration, takes only the right to petition the ABC Board for a transfer of the license. *Queen of the North v. Legrue*, 582 P.2d 144, 149 (Alaska 1978). Due to the restrictions on transfer, the holder of a lien on a liquor license, including the United States, possesses only the right to apply to the ABC Board for a transfer of the license. Just as the Quintos could not have transferred the liquor license without payment of creditors' claims, neither may the United States.

The position of the IRS is one of an ordinary creditor who takes an interest in the license subject to the right of the ABC Board to deny a transfer of the license pending satisfaction of creditors' claims. Such a position does not warrant the imposition of injunctive relief. The United States' motion for summary judgment is hereby denied. The defendants' motions as to the validity of the competing claims against the license and as to whether the IRS is entitled to have the license transferred to Wayne are hereby granted.

Having decided the foregoing, the court now turns to the priority of the liens asserted against the sale proceeds of the license.

The general rule is that once a federal tax lien has attached to a state-created interest, federal law is to be looked to in determining the priority of competing liens

asserted against a taxpayer's property or right to property. *Aquilino*, 363 U.S. at 513, 514.

In instances where a state-created lien and a federal lien are competing for priority, the well-founded principle of "first in time is first in right" applies. *United States v. New Britain*, 347 U.S. 81, 85 (1954); *In re Priest*, 712 F.2d 1326, 1327-28 (9th Cir. 1983), *modified*, 725 F.2d 477 (9th Cir. 1984). A federal tax lien arises at the time the taxes are assessed. 26 U.S.C. § 6322. However, a state-created tax lien has priority over a competing federal tax lien if the state lien is sufficiently specific and certain that it can be characterized as "choate". *New Britain*, 347 U.S. at 84; *In re Priest*, 712 F.2d at 1329. A state-created lien will be "choate" and prevail against a federal lien when it identifies the person or entity with a right of lien on the property, the property subject to the lien, and the amount due. *In re Priest*, 712 F.2d at 1328.

As to the federal lien on the license, only Juneau's lien arises prior in time to that of the IRS. Juneau recorded its lien in the Juneau Recording District on July 28, 1986. The IRS does not dispute the conclusion that the Juneau lien clearly identified Juneau as the entity with a lien on the Quintos' property, as well as the property subject to the lien and the amount due, thus satisfying the "choate" test under *New Britain*. Given that the United States' lien on the Quintos' property arose on September 29, 1986, some three months later, the court finds that Juneau's lien is superior to that of the lien asserted by the United States.

As to the remainder of the defendants' claims asserted against the sale proceeds of the IRS's license, the IRS lien is prior in time. There is no evidence to show that any of the claims had become "choate" prior to September 29,

1986. The IRS claim is therefore superior as to those asserted by the remaining defendants.[7]

The United States' motion for summary judgment claiming an interest sufficient to transfer the license is denied. The United States' motion as it relates to injunctive relief against the ABC Board and the other defendants is denied. The defendant City and Borough of Juneau's motion for summary judgment is granted, and the other defendants' motions for summary judgment are denied subject to the foregoing discussion of the rights between all parties. The clerk of court shall enter judgment dismissing plaintiff's complaint.

Inasmuch as the court has not heard oral argument, the court will reconsider this order in accordance with Local General Rule 5(J) at the request of any party. The parties are admonished not to resubmit the same arguments.

DATED at Anchorage, Alaska this 14th day of June, 1991.

/s/_____
United States District Judge

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[7] This point appears to be moot, as the IRS sale of the Office Lounge's liquor license generated only $20,500. Juneau claims approximately $33,000 due, while the IRS claims approximately $14,000.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A89-475 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF ALASKA, et al.,

Defendants.

ORDER
(On Various Motions for Reconsideration)

On June 14, 1991, this court signed an order in the above captioned case which denied the United States' motion for summary judgment and granted the defendants' cross-motions for summary judgment. On June 27, 1991, the United States moved for reconsideration. On June 28, 1991, the State of Alaska moved for reconsideration/clarification and requested that the court, rather than deciding the priorities among the creditors to the proceeds of the sale of the liquor license, simply rescind the sale on the grounds that the foreclosure was illegal. The City and Borough of Juneau and Alaska Distributors Company moved for reconsideration on July 3, 1991, and July 19, 1991, respectively.

The court hereby grants the State of Alaska's motion for reconsideration/clarification. The sale of the liquor

license by the IRS is hereby rescinded. The court finds that no legal foreclosure action has taken place and the court concludes, based on the reasoning in *United States v. State of California*, 281 F.2d 726 (9th Cir. 1960), and related cases,[1] that the federal government cannot claim or seize any greater interest in the license than that created by the State of Alaska. That part of this court's order of June 14, 1991, which decided the priorities among various creditors to the proceeds of the sale of the liquor license is hereby vacated *sua sponte*.

DATED at Anchorage, Alaska, this 18th day of September, 1991.

/s/
United States District Judge

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[1] *See United States v. Rodgers*, 461 U.S. 688 (1983); *United States v. Bess*, 357 U.S. 51 (1957); *Matter of Professional Bar Co., Inc.*, 537 F.2d 339 (1976).

APPENDIX "B"

Not For Publication
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 91-36274
D.C. No. CV-91-36247
UNITED STATES OF AMERICA

Plaintiff-Appellant,

vs.

STATE OF ALASKA; ALASKA ALCOHOLIC BEVERAGE CONTROL BOARD; CITY & BOROUGH OF JUNEAU; ALASKA DISTRIBUTORS; ODOM CORPORATION; ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS,

Defendants-Appellees.

MEMORANDUM

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Argued and Submitted August 3, 1993
Anchorage, Alaska
Filed September 30, 1993

Before: SCHROEDER, FLETCHER and ALARCON, Circuit Judges.

The United States seeks to quiet title to an Alaska liquor license it purchased at a federal tax sale and seeks an injunction ordering the Alaska Alcoholic Beverage Control Board ("ABC") to transfer the license to the successful bidder at a later sale conducted by the IRS. The district court rescinded the sale, holding that the ABC could properly deny the transfer. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

Marcello and Nancy Quinto operated a bar in Juneau, Alaska known as the Office Lounge. The Quintos held an Alaska liquor license. In 1985 and 1986, the Quintos became delinquent in the payment of taxes arising from the operation of the Office Lounge, including federal and state employment taxes and sales and property taxes assessed by the City and Borough of Juneau. On July 28, 1986, Juneau recorded a notice of tax lien against the Quintos in the amount of $24,854.22. On September 29, 1986, the IRS assessed delinquent taxes against the Quintos totalling $14,389.94, thus creating a federal tax lien that attached to all of the Quintos' property. See 26 U.S.C. §§ 6321, 6322. The United States recorded its lien on September 30, 1986. On that same day, it levied upon the Quintos' property, seizing, inter alia, the liquor license.

The IRS published notice that it would sell the liquor license by sealed bid on November 20, 1986. The IRS was the only bidder at the sale, purchasing the license for $14,827.43. The record reflects that the proceeds of the sale were applied (the amount of the IRS bid apparently was credited) to satisfy fully the Quintos' federal tax liability. The Quintos filed for bankruptcy in December 1986.

On September 30, 1987, after published notice, the IRS auctioned the license. The highest bid, from John W. Henry and Ira W. Rosen on behalf of Wayne Entertainment, Inc., was for $20,500. A certificate of sale was executed by the IRS, transferring "all right, title, and interest of the United States" in the license to Henry and Rosen. (Certified Record 32, Branman Decl. ex. I.).

In January 1988, the IRS applied to the ABC to transfer the license to Wayne Entertainment. Pursuant to Alaska Stat. § 04.11.470, several creditors of the Office Lounge, including the State of Alaska and the City and Borough of Juneau, filed objections to the transfer. Under the Alaska statutory scheme, the ABC will deny an application to transfer a liquor license if

> the transferor has not paid all debts or taxes arising from the conduct of the business licensed . . . unless
>
> (A) the transferor gives security for the payment of the debts or taxes satisfactory to the creditor or taxing authority; or
>
> (B) the transfer is pursuant to a promise given as collateral by the transferor to the transferee in the course of an earlier transfer of the license under which promise the transferor is obliged to transfer back to the transferee in the event of default in payment for property conveyed as part of the earlier transfer of the license[.]

Alaska Stat. § 04.11.360(4).

On April 14, 1988, the ABC denied the IRS's application to transfer ownership of the license, citing as its reasons: 1) the Quintos' bankruptcy; 2) a previous owner's petition to have the license transferred back to herself pursuant to Alaska Stat. 04.11.360(4)(B); and 3) the objections, or "holds," filed by the State of Alaska, the City and Borough of Juneau, and other unsatisfied creditors.

On November 27, 1989, the United States filed this suit seeking a determination that it has "an interest sufficient to transfer the license to Wayne Entertainment, Inc." and that none of the defendants other than the State of Alaska may assert any right, title or interest in the license. The United States also seeks an injunction requiring the ABC to transfer the liquor license to Wayne Entertainment.

On June 14, 1991, the district court granted summary judgment in favor of the City and Borough of Juneau, denying the other parties' motions for summary judgment. The court held that the restriction on the transfer of liquor licenses embodied in Alaska Stat. § 04.11.360(4) was a proper exercise of state power, and that the IRS could "acquire or transfer its interest in the license only upon satisfaction of creditors' claims." (Excerpts of Record at 18.).[1] Upon a motion for reconsideration by the State of Alaska, the court further ordered that the sale of the license to Wayne Entertainment be rescinded.

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[1] The court also ruled on the priority of the claims. However, it subsequently vacated this portion of its opinion.

This appeal by the United States followed.

DISCUSSION

The United States maintains that it is entitled, as a matter of federal law, to sell the liquor license to Wayne Entertainment in order to "satisfy the federal tax lien."[2]

In *United States v. Battley (In re Kimura)*, 969 F.2d 806 (9th Cir. 1992), another case involving Alaska's liquor license transfer provisions, we held that, notwithstanding the presence of a federal tax lien, Alaska was entitled to "reserve to itself payment of delinquent state or local taxes: from the proceeds of a liquor license transfer. *Id.* at 812; *accord United States v. Stone (In re Stone)*, No. 91-36338, slip op. 10349, 10355 (9th Cir. Sept. 22, 1993). In so holding, we noted that the interest in property to which a federal lien attaches is the "residual" value of the property after such state and local taxes are paid. *Kimura*, 969 F.2d at 812; *Stone*, slip op. at 10355. Thus, in the instant case, when the IRS acquired the license by sealed bid at the first

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[2] One problem with appellant's position is that the United States no longer has an interest in the license other than as its owner. When the IRS purchased the license and applied the sale price to satisfy the Quintos' tax liability, the federal tax lien was extinguished. 26 U.S.C. § 6322 ("Unless another date is specifically fixed by law, the [tax] lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed . . . is satisfied or becomes unenforceable by reason of lapse of time.")

tax sale, whatever it acquired was subject to the State of Alaska's and Juneau's property interests in the taxes owed them.

Under *Kimura*, the State of Alaska and City and Borough of Juneau are entitled to assert their interests in the license through the state statutory scheme.[3] The sale was properly rescinded.

AFFIRMED.

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[3] The district court did not have the benefit of our recent decision in *Kimura* when it ruled on the summary judgment motions in this case. In upholding Juneau's right to enforce its interest in the license, we note that the district court's rationale for its grant of summary judgment to Juneau conflicts to some extent with our holding in *Kimura* that Alaska may not validly reserve to third-party trade creditors the right to be paid ahead of a federal tax lien. 969 F.2d at 813.

APPENDIX C

United States Constitution

Twenty-first Amendment: Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

United States Code

26 U.S.C. § 6321. Lien for Taxes. If any person liable to pay any tax or neglects or refuses the same, after demand, the amount (including any interest, additional amount, in addition to tax or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such a person.

Alaska Statutes

Alaska Stat. § 04.11.010. License or permit required. (a) Except as provided in AS 04.11.020, a person may not manufacture, sell, offer for sale, possess for sale or barter, traffic in, or barter an alcoholic beverage unless under license or permit issued under this title.

(b) A person may not solicit or receive orders for the delivery of an alcoholic beverage in an area where the results of a local option election have, under AS 04.11.490 - 04.11.500, prohibited the board from issuing, renewing or transferring one or more types of licenses or permits under this title, unless the person is licensed under this title and the order is actually received by that person from the purchaser of the alcoholic beverage. A person who violates this subsection is punishable upon conviction under AS 04.16.200(a) or (b).

(c) In a criminal prosecution for possession of alcoholic beverages for sale in violation of (a) of this section, the fact that a person possessed more than 12 liters of distilled spirits, 24 liters or more of wine, or 45 liters or more of malt beverages in an area where the sale of alcoholic beverages is prohibited under AS 04.11.490, 04.11.492, 04.11.496, or 04.11.500 creates a presumption that the person possessed the alcoholic beverages for sale.

Alaska Stat. § 04.11.030. Death of a licensee. (a) The executor or administrator of the estate of a person who was operating a business as a sole licensee under a license authorized by this title may continue to operate the licensed business until an application for transfer of a license to another person is approved or until the license is forfeited under (b) of this section.

(b) If an application for the transfer of ownership of a license from a deceased licensee is not made within 90

days of the death of the licensee or within an additional 90 days if an application for transfer of ownership made by the executor is denied, or no petition is made to the board for an extension of time under (c) of this section within the time, the license is forfeited.

(c) The board may extend the time limits in (b) of this section on petition of the executor or administrator.

(d) This section does not authorize the transfer of a liquor license by an administrator or executor to the estate of a decedent.

(e) The board may transfer a license to an executor or administrator only in the executor's or administrator's individual capacity.

Alaska Stat. § 04.11.040. Board approval of transfers. (a) A license issued under this title may not be transferred to another person except with the written consent of the board.

(b) A license or permit issued under this title may not be transferred to a new location except with the written consent of the board.

(c) A person may not receive or transfer controlling interest in a liquor license issued to a partnership, including a limited partnership, or a corporation under this title except with the written consent of the board.

Alaska Stat. § 04.11.070. Power limited to the Board. Only the board may issue, renew, transfer, relocate, suspend, or revoke a license under this title.

Alaska Stat. § 04.11.260. Application for new license or permit. (a) An applicant for a new license or permit shall file with the director a written application, signed and sworn to by the applicant, giving the applicant's name and address. If the applicant is a corporation, the application

shall be executed by the authorized officers of the corporation. If the applicant is a partnership, including a limited partnership, the application shall be executed by an authorized general partner. The application must include:

(1) the type of license or permit desired;

(2) a description of the premises for which the license or permit is desired, giving the address by street and number, or other information, so that the location of the premises can be definitely determined;

(3) a statement of the residency of the applicant;

(4) the license fee;

(5) the duration of the license or permit desired;

(6) any other information required by the board.

(b) A corporation applying for a license or permit shall provide the names and addresses of the president, vice-president, secretary, managing officer, and all stockholders who own 10 percent or more of the stock in the corporation, together with any other information required by the board.

(c) An applicant for a new license or permit must include with the application

(1) proof that notice required by AS 04.11.310 has been given;

(2) any petitions required to be secured under AS 04.11.460 before a license may be issued;

(3) evidence of any approval by public authorities required to be obtained under AS 04.11.090(e), 04.11.220(c), 04.11.230(b), 04.11.240(b), or 04.11.250(b), before a license or permit may be issued.

(d) A partnership, including a limited partnership, that applies for a license or permit shall provide information required by the board including the names and addresses of all general partners and all partners with an interest of 10 percent or more.

Alaska Stat. § 04.11.270. Application for renewal of license or permit. (a) An application for renewal of a license or renewal of a conditional contractor's permit must include:

(1) the information required for a new license under AS 04.11.260 except that proof of notice under AS 04.11.310 is not required; and

(2) a list of all convictions of the applicant of violations of this title, a regulation adopted under this title, or an ordinance adopted under AS 04.21.010, that occurred in the preceding year.

(b) A license shall be renewed as follows:

(1 On or before November 1 of each year, the director shall mail an application to renew the license to each licensee at the licensed premises or at a mailing address furnished by the licensee.

(2) An application to renew a license may be filed on or before December 31 and must be accompanied by the annual fee required for the license. An application to renew the license filed after December 31 and on or before February 28 must be accompanied by the annual fee for the license, plus a penalty equal to the annual fee or $100, whichever is less.

Alaska Stat. § 04.11.280. Application for transfer of a license to another person. (a) An application for transfer of a license to another person must contain the same information about the transferee as is required of an applicant for a new license under AS 04.11.260 and must include other information required by the board.

(b) An application for the transfer of a license to another person must be accompanied by a statement, under oath, executed by the transferor, listing all debts of the business and all taxes due by the business. The board shall

Alaska Statute 04.11.330. Denial of license or permit renewal. (a) An application requesting renewal of a license shall be denied if

(1) the board finds, after review of all relevant information, that renewal of the license would not be in the best interests of the public;

(2) the license has been revoked for any cause;

(3) the applicant has not operated the licensed premises for at least 30 eight-hour days during the immediately preceding calendar year, unless the board determines that the licensed premises are under construction or cannot be operated through no fault of the applicant;

(4) the board finds that issuance of an existing license under ALASKA STAT. § 04.11.400(g) has not encouraged tourist trade;

(5) the requirements of ALASKA STAT. § 04.11.420 - 04.11.450 relating to zoning, ownership of the license, and financing of the licensee have not been met;

(6) renewal of the license would violate the restrictions pertaining to the particular license under this title;

(7) renewal of the license is prohibited under this title as a result of an election conducted in accordance with ALASKA STAT. § 04.11.502;

(8) the application has not been completed in accordance with ALASKA STAT. § 04.11.270;

(9) the license was issued under ALASKA STAT. § 04.11.400(j), and the board finds that the public convenience does not require renewal.

(b) An application for renewal of a license may be denied if the applicant is delinquent in the payment of taxes if the tax liability arises in whole or in part out of the licensed business.

(c) An application requesting renewal of a conditional contractor's permit shall be denied if

(1) the board finds, after review of all relevant information, that issuance of the permit would not be in the best interests of the public;

(2) the application has not been completed in accordance with ALASKA STAT. § 04.11.270.

(d) Notwithstanding (a)(3) of this section, a recreational site license issued under ALASKA STAT. § 04.11.210 may be renewed if the license was exercised at least once during the immediately preceding calendar year.

Alaska Statute 04.11.360. Denial of transfer of a license to another person. An application requesting approval of a transfer of a license to another person under this title shall be denied if

(1) the board finds, after review of all relevant information, that transfer of a license to another person would not be in the best interests of the public;

(2) the application has not been completed in accordance with AS 04.11.280;

(3) the application contains false statements of material fact;

(4) the transferor has not paid all debts or taxes arising from the conduct of the business licensed under this title unless

(A) the transferor gives security for the payment of the debts or taxes satisfactory to the creditor or taxing authority; or

(B) the transfer is pursuant to a promise given as collateral by the transferor to the transferee in the course of an earlier transfer of the license under which promise the transferor is obliged to transfer the license back to the transferee in the event of default in payment for property conveyed as part of the earlier transfer of the license;

(5) transfer of the license to another person would result in violation of the provisions of this title relating to identity of licensees and financing of licensees;

(6) transfer of the license to another person would violate the restrictions pertaining to the particular license under this title;

(7) transfer of the license to another person is prohibited under the provisions of this title as a result of an election conducted in accordance with ALASKA STAT. § 04.11.502;

(8) the prospective transferee does not have the qualifications required under this title of an original applicant;

(9) the licensed premises are located in a municipality, the type of license sought to be transferred is a beverage dispensary or package store license, and that type of license is already in effect in the municipality under a community liquor license, unless the transfer is to become effective after the community liquor license is no longer effective, whether as the result of a local option election or otherwise;

(10) the authority sought is authority to operate a beverage dispensary or package store under a community liquor license for premises to be located in a municipality where the authority sought is already held by a private licensee under a beverage dispensary or package store license, unless the transfer is to become effective after the privately held license is no longer effective, whether as the result of a local option election or otherwise;

(11) the license was issued under ALASKA STAT. § 04.11.400(j).

(12) the license was issued under ALASKA STAT. § 04.11.135, unless the transferor is also applying to transfer the beverage dispensary license required under ALASKA STAT. § 04.11.135 to the same transferee.

Alaska Statute 04.11.370. Suspension and revocation of licenses and permits. A license or permit shall be suspended or revoked if the board finds that one or more of the following grounds exists:

(1) misrepresentation of a material fact on an application for a license or permit;

(2) continuation of activities authorized under a license or permit would be contrary to the best interests of the public;

(3) failure on the part of the licensee to correct defects that constitute violations of this title, regulations adopted under this title, or other laws within a prescribed time after receipt of notice issued by the board or its agent;

(4) conviction of a licensee of a violation of a provision of this title, a regulation adopted under this title, or an ordinance adopted under ALASKA STAT. § 04.21.010;

(5) conviction of the agent or employee of a licensee of a violation of this title, a regulation adopted under this title, or an ordinance adopted under ALASKA STAT. § 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under ALASKA STAT. § 04.21.030 with the result that an agent or employee violates a law, regulation, or ordinance;

(6) failure of the licensee to comply with the laws and regulations pertaining to public health in the state;

(7) use of the licensed premises as a resort for illegal possessors or users of narcotics, prostitutes, or promoters of prostitution; in addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in the community as a resort for illegal possessors or users of narcotics, prostitutes, or promoters of prostitution;

(8) occurrence of illegal gambling within the limits of the licensed premises;

(9) permitting any public offense involving moral turpitude to occur on the licensed premises;

(10) violation by a licensee of this title, a regulation adopted under this title, or an ordinance adopted under ALASKA STAT. § 04.21.010;

(11) violation by an agent or employee of a licensee of a provision of this title, a regulation adopted under this title, or an ordinance adopted under ALASKA STAT. § 04.21.010, if the licensee is found by the board to have either knowingly allowed the violation or to have recklessly or with criminal negligence failed to act in accordance with the duty prescribed under ALASKA STAT. § 04.21.030 with the result that the agent or employee violates the law, regulation, or ordinance.

Alaska Statute 04.11.450. Prohibited financial interest.
(a) A person other than a licensee may not have a direct or indirect financial interest in the business for which a license is issued.

(b) A person who is a representative or owner of a wholesale business, brewery, winery, bottling works, or distillery may not be issued, solely or together with others, a beverage dispensary license or package store license. A holder of a beverage dispensary license may be issued a brewpub license, subject to the provisions of ALASKA STAT. § 04.11.135.

(c) In this section, "direct or indirect financial interest" means holding a legal or equitable interest in the operation of a business licensed under this title. However, credit extended by a distiller, a brewery, or a winery to a wholesaler, or credit extended by a wholesaler to persons licensed under this title, or a consulting fee received from a

person licensed under this title, is not considered a financial interest in a business licensed under this title.

(d) A license may not be leased by a licensee to another person or corporation.

(e) For the purposes of this section, a lessor under a graduated or percentage lease-rent agreement involving premises licensed under this title does not hold a financial interest in the business.

(f) A holder of either a general wholesale license or a wholesale malt beverage and wine license may not be employed by or act as the agent or employee of the holder of a beverage dispensary or package store license.

Alaska Statute 04.11.670. Foreclosure. A license issued under this title is not subject to foreclosure, and may not be used as collateral to secure a debt. However, if a license is transferred to another person, the transferor may secure payment for real and personal property conveyed to the transferee upon the promise of the transferee to transfer the license back to the transferor upon default in payment.

Alaska Statute 04.16.200. Unlicensed persons. (a) Except as provided under (b) of this section, a person who violates ALASKA STAT. § 04.11.010 is, upon conviction, guilty of a class A misdemeanor.

(b) A person who violates ALASKA STAT. § 04.11.010 in an area where the results of a local option election have, under ALASKA STAT. § 04.11.490 - 04.11.500, prohibited the board from issuing, renewing, or transferring one or more types of licenses or permits under this title in the area is, upon conviction, guilty of a class C felony.

(c) It is an affirmative defense to a prosecution under (a) of this section that no profit was involved in the solicitation or receipt of an order for the delivery of an alcoholic beverage. However, the affirmative defense

created under this subsection is not available in a prosecution of a person charged with selling or offering for sale alcoholic beverages to a person under 21 years of age.

(d) Upon conviction of a person of a violation under (a) of this section, the court shall impose a minimum sentence of imprisonment of not less than 10 consecutive days. The execution of the sentence may not be suspended and probation or parole may not be granted until the minimum imprisonment provided in this subsection has been served. Imposition of sentence may not be suspended except upon the condition that the defendant be imprisoned for no less than the minimum period provided in this subsection.

(e) A person who sends, transports, or brings alcoholic beverages into a municipality or established village in violation of ALASKA STAT. § 04.11.496 is, upon conviction,

(1) guilty of a class A misdemeanor if the quantity imported is less than 12 liters of distilled spirits, 24 liters of wine, or 45 liters of malt beverages; or

(2) guilty of a class C felony if the quantity imported is 12 liters or more of distilled spirits, 24 liters or more of wine, or 45 liters or more of malt beverages.

ALASKA ADMINISTRATIVE CODE

Alaska Admin. Code tit. 15, §104.175 Transfers. (a) The transfer of ownership of a license or of a controlling interest in a license issued to a corporation and the transfer of location of a license require the prior written approval of the board upon application of the transferor.

(b) An application for the transfer of a license or of a controlling interest in a license issued to a corporation must

contain the same information about the transferee as required of an applicant for a new license.

(c) The transfer of a controlling interest in a corporation which is the holder of a license issued under ALASKA STAT. § 04.11.400(j) is prohibited.

(d) Without limitation, the board will, in its discretion, deny an application to transfer a license to another person if the license was issued to the licensee less than one year before the date of the proposed transfer. This subsection applies only to new licenses first applied for on or after April 30, 1984.